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No. 80-1777

IN THE

Supreme Court of the United States of America

OCTOBER TERM, 1980

DAVID ORGELL, INC., PETITIONER

v.

JOSIAH WEDGWOOD & SONS, INC., RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENT

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Preliminary Statement

On August 10, 1981, respondent's counsel received the *amicus curiae* brief ("Brief") filed by the Solicitor General of the United States. Respondent submits this supplemental brief pursuant to Rule 22(6) of the Rules of the United States Supreme Court, in order to address substantial misstatements of fact and law made in the Brief.

I

THE BRIEF RELIES ON A MATERIALLY INCORRECT STATEMENT OF THE FACTS.

Respondent Wedgwood allegedly refused to sell a line of its merchandise to petitioner Orgell in 1965 as a result of a conspiracy with another defendant. That refusal was reiterated in 1968, 1972, 1976 and 1977. The Solicitor General's Brief omits any mention of the 1972 refusal, when: (1) petitioner engaged the services of O'Melveny & Myers, one of the largest and best law firms in Los Angeles, who wrote to respondent threatening antitrust legal action if respondent did not sell to petitioner; (2) respondent's attorney denied petitioner's version of the facts, but stated, citing authority, that even if it were correct, petitioner's claim would still not be actionable, and invited petitioner's attorneys to show how he was wrong on the law or the facts, in which case he would take the matter up further with his client and advise accordingly; and (3) the legal claim was dropped in that O'Melveny & Myers never again communicated with respondent or its attorney, and neither did petitioner until four years later, in 1976, when it again asked to be sold the "Wedgwood" line. Only by omitting these facts could the Brief argue in the context of this case that its version of the applicable limitations rule was required

> "[since] those plaintiffs most likely to bring suit more than four years after an initial refusal to deal are the ones most likely to lack alert antitrust counsel and, hence, least likely to become aware of a prophylactic rule until the deadline has passed." (p. 6, n.4).

Even more importantly, omitting petitioner's pursuit and abandonment of its legal claim (and threat to sue) permitted the Brief to overlook the finding in *In re Multidistrict Vehicle Air Pollution*, 591 F.2d 68, 72 (9th Cir.) *cert. denied*, 444 U.S. 900 (1979), "that AMF [plaintiff] itself was convinced by the last quarter of 1964 that it was out of the market" which the court employed in showing that the refusal to deal in that case

had by a pre-limitation period date become "irrevocable, immutable, permanent and final" notwithstanding later approaches by AMF to some of the alleged conspirators. In this case, similarly, the finality of respondent's decision not to deal with petitioner was underscored, reinforced and acquiesced in by petitioner's own apparently carefully considered action in dropping its legal claim against and threat to sue respondent.

II

THE SOLICITOR GENERAL MANUFACTURES A CONFLICT AMONG THE COURTS OF APPEAL ON THE STATUTE OF LIMITATIONS ISSUE IN REFUSAL TO DEAL CASES BY MISREADING APPLICABLE CASE LAW.

The Solicitor General contends that, *standing alone*, each reiteration of a refusal to deal gives rise to a new claim for the purposes of 15 U.S.C. § 15(b) in the Fourth, Fifth and Eighth Circuits, but not in the Sixth and Ninth Circuits. To reach that conclusion, he must ignore the realities of the cases he reviews, lump together refusal to deal cases with monopolization and tying cases, and imagine horribles which lack any support whatever, in or outside of the record.

The governing rule is the one announced by this Court in *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971), and referred to by the Solicitor General (Brief, pp. 2-3). In a "continuing conspiracy" case, "each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and . . . as to those damages, the statute of limitations runs from the commission of the act."

However, if there is "injury" of a particular kind, reiteration simply confirms it, creating added damages but no new claim. The claim accrues, and the statute begins to run as to

injury of a particular type, when an injury of that type has unquestionably and ascertainably occurred. *Zenith, supra,* 401 U.S. at 338-39.

The Solicitor General's "conflict" rests primarily on Fifth Circuit cases involving tying and monopolization claims. Yet, he overlooks the fact that in each, *new affirmative* acts took place inside the limitations period aimed at *altering qualitatively, consolidating* and *extending* the allegedly anticompetitive conduct, causing injury independent in character from that previously suffered by the plaintiff. *See, e.g., Imperial Point Colonnades Condominium, Inc. v. Mangurian;* 549 F.2d 1029, 1035 (5th Cir.), *cert. denied,* 434 U.S. 859 (1977) (tying case: collection of and *increases* in rents within limitations period); *Poster Exchange, Inc. v. National Screen Service Corp.,* 517 F.2d 117, 123 (5th Cir. 1975), *cert. denied,* 423 U.S. 1054 (1976) (court stressed it confronted a *monopolization* case where one defendant conspired during the limitations period to *consolidate* the other defendant's monopoly position in return for a share of the monopoly profits derived thereby).

There is no conflict between these decisions and those which hold that the simple reiteration of a refusal to deal in a non-monopoly context does not start the statute of limitations running anew. Contrary to the intimation of the Brief (page 3, n.4), substantial antitrust policy reasons support the distinction between monopoly and non-monopoly situations. In the former, the gravamen of the antitrust evil is the *monopoly itself,* which a reiterated refusal to deal enhances and consolidates. In the latter, the gravamen of the antitrust evil is the simple refusal to deal itself, which reiteration does nothing to enhance or consolidate. The mere repetition *violates no antitrust rule or policy at that juncture qualitatively different from the original, final refusal to deal.* Tying is akin to monopoly, because each *exercise* of the tie-in confirms the complete market control the arrangement represents and creates *new* injury to competition in the qualitative sense.

The Fourth and Eighth Circuit cases the Solicitor General urges as conflicting with the Ninth and Sixth Circuits simply establish that a refusal to deal must be unequivocally *communicated* to the plaintiff and *injury result thereby;* once that happens, the cause of action accrues. In *Charlotte Telecasters, Inc. v. Jefferson-Pilot Corp.*, 546 F.2d 570 (4th Cir. 1976), the issue was when a cause of action arose for the allegedly anticompetitive award of a cable television franchise to a competitor of plaintiff's. The court held that "exclusion from participation in an industry constitutes a continuing conspiracy *unless the exclusion is final in its impact.*" *Id.*, at 572 (emphasis added).

The court found, however (*Id.*, at 573) that the possibility had been left open that other franchises would be granted, and that the initial grant had been on a nonexclusive basis. Thus the refusal to deal was not "final" until plaintiff was later definitely informed that in any case it would not get a franchise. The limitations period was held to run from the time the plaintiff was so informed, even though the city council had at that time stated it would give some thought to plaintiff's request, but then did nothing.

In *Pioneer Co., Inc. v. Talon, Inc.*, 462 F.2d 1106 (8th Cir. 1972), plaintiff had been doing business with defendant *on an order by order basis* for five years. One of defendant's salesmen, allegedly pursuant to an anticompetitive conspiracy, verbally informed plaintiff that defendant's sales agent would "no longer sell" to plaintiff and that "all business relations were terminated." 462 F.2d at 1107. However, plaintiff's President testified that he had received "no formal commitment from anyone that orders would not be accepted." *Id.* His "first notification" came when two orders he sent in were together rejected in a letter mentioning *no previous* termination of business relations and announcing a decision to "discontinue sales to jobbers whose requirements have been modest." *Id.* at 1108. *No subsequent orders were placed.* The Solicitor General's discussion of *Pioneer* itself simply confirms that in holding

that the statute of limitations had not run until the "formal notification" represented by the refusal of the orders, the court properly measured the limitations period from the date when the refusal to deal was *unequivocally communicated, and ascertainable injury occurred,* which it held did not happen until the orders were formally refused.

The teaching of *Charlotte Telecasters* and *Pioneer* is clear. Where a defendant has purportedly refused to deal with a plaintiff but, by its own words or conduct has either suggested that the door remains open or has failed effectively to communicate the refusal, the plaintiff's claim has not accrued. Only where the defendant refuses to deal and does so in a fashion which clearly indicates that the decision is intended to be real and final is the claim fixed; however, it is unquestionably fixed at that point.

These principles are clearly in accord with the ruling in *In re Multidistrict Vehicle Air Pollution, supra,* 591 F.2d at 68, the decision which the Ninth Circuit relied on in affirming summary judgment in respondent's favor. There, as here, plaintiff sought to do business with defendants. There, as here, plaintiff argued that it had made other, futile attempts to do business with defendants during the limitations period. 591 F.2d at 71. There, as here, and *unlike* in *Charlotte Telecasters* and *Pioneer,* "whatever hope of business [plaintiff] may have clutched, its source could not have been actions or words of the [defendants]." *Id.* at 72.

The mere fact that decisions can *always* be changed was not enough for the Ninth Circuit to conclude that the refusal to deal with which it was concerned was other than "irrevocable, immutable, permanent and final." Thus, *In re Multidistrict* does not, as the Brief appears to contend on page 4, stand for the proposition that *any* additional refusal to deal starts a new limitations period. To the contrary, as above discussed, it holds that if a new refusal follows a final refusal, the new one is but an echo, causing no new damage and starting no new limitations period. Indeed, the court cited for that very proposition

language in *Imperial Point Colonnades, supra,* 549 F.2d at 1029: "[W]here all the damages complained of necessarily result from a pre-limitations act by defendant, no new cause of action accrues for any subsequent acts committed by defendant within the limitations period *because those acts do not injure plaintiff.*" *In re Multidistrict, supra,* 591 F.2d at 72 (emphasis supplied).

This view is logical as well as legal. The antitrust laws seek to deter anticompetitive behavior. They also seek to encourage prompt corrective action. If a refusal to deal pursuant to a conspiracy is simply reiterated, the reiteration causes no *new* anticompetitive or antitrust injury if neither the plaintiff nor the marketplace had any reason to believe that the refusal to deal was open to reconsideration. If a refusal to deal pursuant to one conspiracy is reiterated pursuant to a *different* conspiracy, then there is *new* anticompetitive injury giving rise to a new claim. If a refusal to deal is not merely reiterated but expanded—applied to other products or markets—again, there is a different injury and a new claim.

The Solicitor General recommends that the petition be granted so that the Court may rule that each successive refusal to deal begins a new limitations period, even where each new refusal is merely a reiteration of prior refusals over a 13-year period, and even where a disappointed retailer has during that period hired a lawyer, threatened suit, and then dropped his claim when rebuffed again. According to the Brief, someone in the position of respondent (and not alleged to be a monopolist) can *never* shake loose from a retailer who "won't take no" for an answer. Every day for 13, or perhaps 25 or 50 years, the retailer can, according to this view, start a new limitations period running by simply writing another letter, or calling again, perhaps just leaving a message. It would appear, according to the Brief, that in such a situation the statute would commence to run only when the supplier and/or the retailer went out of business. In short, the recommendation in the Brief should not be adopted because, among other reasons, it is

advanced to achieve a result that, respectfully, makes no sense, particularly in a case like this one which does not involve a claim of monopoly or monopolization.

The conflict the Solicitor General creates between the Circuits is, as has been demonstrated, one the courts themselves do not acknowledge. *See generally* L. Sullivan, *Antitrust* 775-76 (1977). Indeed, the "conflict" is the result of tortured readings (and misreadings) of the applicable cases, and a failure to appreciate the pertinent antitrust policies which are their foundation.

Even in clear disputes of public significance, this Court has always avoided granting petitions which present illusory rather than true conflicts amongst the courts of appeal. It has frequently returned to the language of *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923), where it stressed that in cases of such purported conflict, no writ should be granted except ". . . in cases where there is a real and embarrassing conflict of opinion between the circuit courts of appeal." This is in no sense such a case.

III

THE REAL QUESTION IN THIS CASE IS WHETHER THE STATUTE OF LIMITATIONS BEGINS TO RUN ONCE A REFUSAL TO DEAL IS EVIDENTLY FINAL.

The Brief suggests under "Question Presented" that respondent contended and the Ninth Circuit ruled that suit has to be brought "within four years of the initial refusal". No such contention and ruling has been made. The real issue is whether the statute commences to run when a refusal has become final and unequivocal, regardless of its subsequent reiterations. Such a "final" refusal may or may not be the *first* refusal to deal. To suggest otherwise, as the Brief, does, is to mischaracterize what this Court is asked to review. And that is critical, because on the *real* issue before this Court, there is no conflict among the courts of appeal in the factual context of this case. Only by presenting a *false* question can the Brief argue in favor of the petition.

It is a commonplace that this Court does not decide abstract questions of law or render advisory opinions. As Mr. Justice Brennan has put it: "While the Court decides questions of public importance, it decides them in the context of meaningful litigation. Its function in resolving conflicts among the Courts of Appeals is judicial, not simply administrative or managerial." *S.S. Monrosa v. Carbon Black Export, Inc.*, 359 U.S. 180, 184 (1959).

CONCLUSION

Respondent is disturbed by the Solicitor General's mischaracterization of the applicable facts, cases and policies involved in this proceeding. The courts are in harmony on the application of the Clayton Act's statute of limitations to the varied antitrust claims that can be urged. Only the interpretation which they have adopted—with which the decision below is entirely consistent—serves both to further the objectives of the substantive provisions of the antitrust laws and the need for predictability and repose that the passage of a statute of limitations addressed. The Court should reject the position urged by the Solicitor General and deny the petition.

Respectfully submitted,

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